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Enforcement of International Arbitration Awards: Res Judicata, Issue Estoppel and Abuse of Process in a Transnational Context

by

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Keywords: International Arbitration, New York Convention, Award, Setting Aside, Enforcement, Res Judicata, Estoppel, Abuse of Process

Abstract: Beyond the effect of a judgment of the court of the seat setting aside the award, the relationship between a challenge of the award at the seat and enforcement under Article V of the New York Convention is unclear as is the relationship between two or more sets of enforcement proceedings in different jurisdictions. This article explores whether a judgment rejecting a challenge of the award at the seat of the arbitration or granting or refusing enforcement gives rise to an estoppel in further enforcement proceedings. This would preclude the party opposing enforcement from re-litigating issues that have been decided in the previous judgment as well as issues that could have been raised, and ultimately decided, in the previous proceedings. Furthermore, this article examines whether a party who does not challenge an arbitral award at the seat of the arbitration or does not oppose an application for enforcement of the award can raise, in further enforcement proceedings, a defense that could have been a ground for challenging the award at the seat or opposing its enforcement in previous proceedings. Broadly, the answer to these questions has been that a judgment rejecting a challenge of the award at the seat or granting or refusing its enforcement does not prevent the unsuccessful party from opposing the enforcement of the award in a foreign country and that the unsuccessful party can elect whether to challenge the award at the seat or to wait and raise any ground of invalidity of the award in enforcement proceedings. This article challenges this general assumption and demonstrates how the doctrines of issue estoppel and abuse of process may prevent a party from opposing enforcement on grounds that have been, or could have been, raised at the seat of the arbitration or in previous enforcement proceedings. Consistency and finality are well served by a structured and predictable application of these doctrines on a transnational basis.

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A. Introduction

An often unexplored problem in international commercial arbitration is the relationship between the remedies against the award at the seat of the arbitration and enforcement proceedings. This relationship is governed by the New York Convention of 1958 in Article V(1)(e), which provides that recognition and enforcement of a foreign arbitral award may be refused if the party against whom they are invoked proves that the award has been suspended or set aside by a competent authority in the country in which, or under the law of which, the award was made.¹ Plainly, this provision only deals with the case in which the unsuccessful party in the arbitration obtains, at the seat of the arbitration, a favorable judgment by a court of supervisory jurisdiction. There is nothing, in Article V or in the New York Convention more generally, which applies to the case in which a challenge to the arbitral award was dismissed or no challenge was made at all at the seat of the arbitration and the unsuccessful party raises a defense that it had raised, or could have raised, before the courts of the seat.² And yet, this situation arises very frequently, indeed probably much more often than the setting aside of the award in the jurisdiction of the seat being pleaded as a defense to enforcement. The received wisdom,

¹ In this article, it is assumed that “the country in which, or under the law of which, the award was made” is the country of the seat of the arbitration. The New York Convention appears to leave to the Contracting States the definition of the criteria that determine where, or under which law, the award was made and more and more States adopt the seat as the main criterion for the localization of the arbitral proceedings: see Klaus Peter Berger, *Re-examining the Arbitration Agreement: Applicable Law – Consensus or Confusion?* in INTERNATIONAL ARBITRATION 2006: BACK TO BASICS? 301, 315 (ICCA Congress Series, No. 13, 2007); Piero Bernardini, *Arbitration Clauses: Achieving Effectiveness in the Law Applicable to the Arbitration Clause* in IMPROVING THE EFFICIENCY OF ARBITRATION AGREEMENTS AND AWARDS: 40 YEARS OF APPLICATION OF THE NEW YORK CONVENTION 197–203 (Albert Jan van den Berg (ed.), ICCA Congress Series, No. 9, 1998); Gabrielle Kaufmann-Kohler, *Identifying and Applying the Law Governing the Arbitration Procedure – The Role of the Law of the Place of Arbitration* in IMPROVING THE EFFICIENCY OF ARBITRATION AGREEMENTS AND AWARDS: 40 YEARS OF APPLICATION OF THE NEW YORK CONVENTION 338–343 (ICCA Congress Series No. 9, 1999); GARY B. BORN, INTERNATIONAL ARBITRATION: LAW AND PRACTICE 307–309 (Kluwer Law Arbitration 2012).

² The problem in question is not limited to the relationship between remedies at the seat of the arbitration and enforcement proceedings. Remedies against the award at the seat of the arbitration can be considered as the most important manifestation of the supervisory or supportive jurisdiction of the courts over the arbitration but they are not the only one. A court may, for instance, rule on the validity of the arbitration agreement under Article II of the New York Convention, if one party brings proceedings in court in breach of the arbitration agreement, or on the proper constitution of the arbitration tribunal on an application for the appointment of an arbitrator. This article is, however, limited to the relationship between remedies against the award at the seat of the arbitration and enforcement proceedings under the New York Convention and to the relationship between two or more sets of enforcement proceedings. In principle, the conclusions reached in respect of the relationship between two or more sets of enforcement proceedings should apply also to the relationship between other arbitration-related proceedings and enforcement proceedings.

pretty much unchallenged so far, is that a judgment rejecting a challenge against the award at the seat of arbitration does not bind the court of the place of enforcement.³ A fortiori, a party who does not challenge the award at the seat can plead, under Article V of the New York Convention, issues that it could have raised before the courts of the seat.⁴ The consequence is that, in enforcement proceedings, the unsuccessful party can re-argue issues already litigated at the seat and litigate for the first time any issue that it did not raise before the courts of the seat either because the challenge was of a more limited scope or because there was no challenge at all. Similarly, the relationship between two or more sets of enforcement proceedings under Article V of the Convention is unexplored and there is a view that the unsuccessful party may oppose the enforcement of the award on grounds that he did not raise, or that have been rejected, in previous enforcement proceedings. This article will argue that the New York Convention allows for a different solution, which is left to the law of the enforcement State, and that, in certain circumstances, a party should not be allowed to re-litigate issues that have already been litigated, or could have been litigated, in previous setting aside or enforcement proceedings.

This article is structured as follows. Firstly, it challenges the traditional approach to the relationship between the remedies at the seat and enforcement proceedings and demonstrates that such an approach is neither required under the New York Convention nor necessarily desirable as a matter of policy. Secondly, it discusses the application of the doctrine of issue estoppel⁵ in the relationship between setting aside proceedings at the seat and enforcement proceedings. Thirdly, it examines the application of the broader doctrine of abuse of process⁶ also in the relationship between setting aside proceedings at the seat and enforcement proceedings. Fourthly, it analyzes the application of the doctrines of issue estoppel and abuse of process in the relationship between two or more

³ Maxi Scherer, *Effects of Foreign Judgments Relating to International Arbitral Awards: Is the "Judgment Route" the Wrong Road?* 4 JOURNAL OF INTERNATIONAL DISPUTE SETTLEMENT 587, 603–604 (2013) (U.K.), citing ABCI v. Banque Franco-Tunisienne (2002) 1 Lloyd's Rep. 511 (QB) (Eng. and Wales).

⁴ Dirk Otto & Omaia Elwan, *Article V(2)*, in RECOGNITION AND ENFORCEMENT OF FOREIGN ARBITRAL AWARDS: A GLOBAL COMMENTARY ON THE NEW YORK CONVENTION 407–409 (Herbert Kronke et al. (eds.), Kluwer Law International 2010). Matthias Scherer and Sam Moss, *Resisting Enforcement of a Foreign Arbitral Award under the New York Convention*, 51 INTER-PACIFIC BAR ASSOCIATION JOURNAL 17 (2008) and David Howell, *Issue Estoppel Arising out of Foreign Interlocutory Court Proceedings in International Arbitration*, 20 JOURNAL OF INTERNATIONAL ARBITRATION 153, 164–166 (2003). See, e.g., Hong Kong: Paklito Ltd v. Klockner East Asia Ltd (1993) 2 HKLR 39; Hebei Import & Export Corporation v. Polytek Engineering Company Limited (1999) 24 Y.B. COMM ARB 652 (Court of Final Appeal of the Hong Kong Special Administrative Region); Germany: Not indicated v. Not indicated, Oberlandesgericht, (2006) 31 Y.B. COMM ARB 652; Manufacturer (Netherlands) v. Buyer (Germany), Oberlandesgericht, Frankfurt am Main, 26 Sch 28/05, 26 June 2006, (2007) 32 Y.B. COMM ARB 351; French Seller v. German Buyer, Oberlandesgericht, Munich, 23 November 2009 and Bundesgerichtshof, Third Civil Chamber, 16 December 2010 (16 December 2010/Bundesgerichtshof/III ZB 100/09) (2011) 36 Y.B. COMM ARB 273.

⁵ PETER BARNETT, RES JUDICATA, ESTOPPEL, AND FOREIGN JUDGMENTS 134–137 (Oxford University Press 2001). V.V. Veeder, *Issue Estoppel Reasons for Awards and Transnational Arbitration*, in 14 ICC BULLETIN, SPECIAL SUPPLEMENT 73, 74–75 (2003).

⁶ PETER BARNETT, RES JUDICATA, ESTOPPEL, AND FOREIGN JUDGMENTS 185–187 (Oxford University Press 2001).

sets of enforcement proceedings. Fifthly, it considers corrective mechanisms that courts can use, in certain circumstances, to allow a party to re-litigate an issue that would otherwise be precluded. Finally, conclusions are drawn.

B. The traditional approach and its criticism

In international arbitration, it is well established that the courts of the State of the seat of the arbitration have supervisory jurisdiction over the award. This supervisory jurisdiction concerns, in particular, the remedies against the award available under national arbitration legislation. These remedies generally comprise an application for setting aside the award on grounds that include, although they are not necessarily limited to, the grounds for refusing recognition and enforcement of the award under Article V(1)(a)–(c) and (2) of the New York Convention.⁷

Given this general framework, if the view is taken that a judgment dismissing a challenge at the seat or failure to challenge the award at all or a judgment granting the enforcement of the award or failure to oppose enforcement of the award at all has no effect in further enforcement proceedings, the unsuccessful party in the arbitration will have a choice as to the forum in which to challenge the award: it can either challenge the award at the seat or it can wait until the successful party seeks enforcement abroad. Furthermore, the unsuccessful party has two, or more, opportunities to challenge an award: it can challenge the award at the seat and, if unsuccessful, it can raise the same issue time and again in enforcement proceedings in any jurisdiction in which enforcement is sought without being bound by the outcome of the previous setting aside or enforcement proceedings.

This position is not fully satisfactory. Finality is an important value in international arbitration and to give the unsuccessful party the opportunity to litigate the same issue time and again around the world does not appear to be in line with this fundamental objective.⁸ Furthermore, there seems to be no principled reason to allow a party to do so,

⁷ A perfect match between the grounds for refusing recognition and enforcement under the New York Convention and the grounds for setting aside the award is achieved under the UNCITRAL Model Law on International Commercial Arbitration (“Model Law”). The grounds on which a court may set aside an award under Article 34(2) of the Model Law correspond to the grounds on which a court may refuse to recognize and enforce an award under Article 36(1)(a)(i)–(iv) and (b)(i)–(ii). The only additional ground for refusing to recognize and enforce an award is the suspension or setting aside of the award in the country of origin under Article 36(1)(a)(v), which clearly does not apply in proceedings for setting aside an award at the seat. In other legal systems this correspondence may not be complete but still remedies against the award at the seat generally include the grounds on which enforcement may be refused under Article V of the New York Convention. This is the case, for instance, in Article 190(2) of the Swiss Federal Private International Law Act of 18 December 1987, sections 67, 68 and 69 of the English Arbitration Act 1996, and sections 10 and 11(b) of the U.S. Federal Arbitration Act.

⁸ This view appears to be receiving support from senior judges around the world, speaking extra-judicially. For example, Lord Mance has suggested that in today’s internationalized legal order, we need “greater coordination and coherence between different legal systems – more, rather than less, mutual recognition and enforcement of each other’s decisions”: Lord Mance, *Arbitration – a Law unto Itself?*, 30th Annual Lecture organized by The School of International Arbitration and Freshfields Bruckhaus Deringer (4

or at least not without qualification. If the unsuccessful party had a full opportunity to litigate an issue in a fair trial before an impartial court of competent jurisdiction, re-litigating or re-opening the issue does not serve the ends of justice. Justice has been done or could have been done already and finality ought to prevail, in the interest of the other party and in the public interest.

Two objections can be raised against this reasoning. The first is purely doctrinal. The New York Convention allows the unsuccessful party to re-litigate, under Article V, issues that have already been litigated at the seat of the arbitration or in previous enforcement proceedings.⁹ This objection, however, would not be well founded. Article V of the New York Convention is a maximum rule not a minimum rule.¹⁰ This means that Article V sets out the only grounds on which recognition and enforcement of a foreign arbitral award may be refused but does not compel the courts of a Contracting State to refuse recognition and enforcement of a foreign award if one of the grounds in Article V is established. The language of Article V(1) and (2) is clear in providing that recognition and enforcement “may” be refused. Therefore, if one of the grounds under Article V of the New York Convention is established, the court has the power, or is permitted, to refuse recognition and enforcement but is not required to do so.¹¹ Thus, the court may, in

November 2015) 1, 14. Along the same lines, the Chief Justice of Singapore The Hon The Chief Justice Sundaresh Menon has argued that “[r]ecognising issue estoppel in this context seems eminently sensible, both from the perspective of harmonising the treatment of awards and perhaps even more importantly, the overarching public policy of finality”: The Hon The Chief Justice Sundaresh Menon, *Patron’s Address*, 81 ARBITRATION 413, 424 (2015) (U.K.).

⁹ This philosophy is expressed, for example, in PT First Media TBK v. Astro Nusantara International BV and others [2013] SGCA 57, para 67, where the Singapore Court of Appeal relied on the statement by Lord Mance in *Dallah Real Estate and Tourism Holding Co v. Ministry of Religious Affairs of the Government of Pakistan* [2010] UKSC 46, [2011] 1 AC 763, para 28 that Article VI of the New York Convention and section 103(5) of the English Arbitration Act 1996 do not contain “any suggestion that a person resisting recognition or enforcement in one country has any obligation to seek to set aside the award in the other country where the award was made”. In the statement in question, Lord Mance was commenting on whether a party that objected to the jurisdiction of the tribunal could raise the objection afresh in enforcement proceedings even if he had not challenged the award at the seat. As will be explained later, Lord Mance was not excluding the possibility that a party could be precluded from re-litigating issues that had been already litigated before the courts of the seat.

¹⁰ ALBERT JAN VAN DEN BERG, *THE NEW YORK ARBITRATION CONVENTION OF 1958: TOWARDS A UNIFORM JUDICIAL INTERPRETATION* 265 (Asser 1981). Patricia Nacimiento, *Article V(1)(a), in* RECOGNITION AND ENFORCEMENT OF FOREIGN ARBITRAL AWARDS: A GLOBAL COMMENTARY ON THE NEW YORK CONVENTION 208–209 (Herbert Kronke et al. (eds.), Kluwer Law International 2010); JULIAN D.M. LEW, LOUKAS A. MISTELIS & STEFAN KRÖLL, *COMPARATIVE INTERNATIONAL COMMERCIAL ARBITRATION* 445 (Kluwer Law International 2003); GARY B BORN, *INTERNATIONAL ARBITRATION: LAW AND PRACTICE* 380 (Kluwer Law International 2012).

¹¹ This proposition is still controversial: see, denying that Art V may be construed as giving the court a discretion not to enforce the award, Philippe Fouchard, *La portée internationale de l’annulation de la sentence arbitrale dans son pays d’origine* REVUE DE L’ARBITRAGE 344 [1997] (Fr.); JULIAN D.M. LEW, LOUKAS A. MISTELIS & STEFAN KRÖLL, *COMPARATIVE INTERNATIONAL COMMERCIAL ARBITRATION* 706 (Kluwer Law International 2003). However, the better view is that Art V is permissive and not mandatory: ALBERT JAN VAN DEN BERG, *THE NEW YORK ARBITRATION CONVENTION OF 1958*, 265 (Kluwer Law and Taxation 1981); Jan Paulsson, *May or Must Under the New York Convention: An Exercise in Syntax and Linguistics*, 14 ARBITRATION INTERNATIONAL 227 (1998) (U.K.); William Park, *Duty and Discretion in*

its discretion, decide to enforce the award if one of the grounds under Article V is established. Furthermore, Article VII of the New York Convention stipulates that the provisions of the Convention do not deprive any interested party of the right to avail itself of an arbitral award in the manner and to the extent allowed by the law of the country in which recognition and enforcement are sought. Therefore, rules of national law that are more favorable to the recognition and enforcement of the award remain fully applicable, which means that a court in enforcement proceedings may still recognize and enforce a foreign arbitral award even if a ground under Article V is established, provided that national law allows the court to do so.¹²

This interpretation of the New York Convention has been endorsed by the English courts, albeit with some hesitation. In *Yukos Oil Co v. Dardana Ltd*, Mance LJ, as he then was, commented that “[t]he use of the word ‘may’ must have been intended to cater for the possibility that, despite the original existence of one or more of the listed circumstances, the right to rely on them had been lost, by for example another agreement or estoppel”.¹³ Lord Mance JSC in *Dallah Real Estate* confirmed this approach and explained that the use of the word “may” must have been intended “to enable the court to consider other circumstances, which might on some recognizable legal principle affect the prima facie right to have enforcement or recognition refused”.¹⁴ His Lordship went on to comment that Article V of the New York Convention “covers a wide spectrum of potential objections to enforcement or recognition, in relation to some of which it might be easier to invoke such discretion as the word “may” contains than it could be in any case where the objection is that there was never any applicable arbitration agreement between the parties to the award”.¹⁵ Lord Collins JSC framed the discretion in somewhat broader terms: “the court before which recognition or enforcement is sought has a discretion to recognize or enforce even if the party resisting recognition or enforcement has proved

International Arbitration, 93 AMERICAN JOURNAL OF INTERNATIONAL LAW 805 (1999) and Nadia Darwazeh, *Article V(1)(e)*, in RECOGNITION AND ENFORCEMENT OF FOREIGN ARBITRAL AWARDS: A GLOBAL COMMENTARY ON THE NEW YORK CONVENTION 308–310 (Herbert Kronke et al. (eds.), Kluwer Law International 2010).

¹² Emmanuel Gaillard, *The Relationship of the New York Convention with Other Treaties and with Domestic Law*, in ENFORCEMENT OF ARBITRATION AGREEMENTS AND INTERNATIONAL ARBITRAL AWARDS 69 (Emmanuel Gaillard & Domenico Di Pietro (eds.), Cameron May 2009); Dirk Otto, *Article VII*, in RECOGNITION AND ENFORCEMENT OF FOREIGN ARBITRAL AWARDS: A GLOBAL COMMENTARY ON THE NEW YORK CONVENTION 448–449 (Herbert Kronke et al. (eds.), Kluwer Law International 2010); FOUCHARD GAILLARD AND GOLDMAN ON INTERNATIONAL COMMERCIAL ARBITRATION 134–138 (Emmanuel Gaillard & John Savage (eds.), Kluwer Law International 1999). See, for example, France: *Société Pablak Ticaret Limited Sirketi v. Norsolor SA* (9 October 1984) Cour de Cassation (1986) 11 Y.B. COMM ARB 484; Polish *Ocean Line v. Jolasry* (10 March 1993) Cour de Cassation (1994) 19 Y.B. COMM ARB 663; *Hilmarton Ltd v. Omnium de Traitement et de Valorisation-OTV* (1995) 20 Y.B. COMM ARB 665; *Kompas Overseas Inc v. OAO Severnoe Rechnoe Parokhodstvo* (Northern River Shipping Company), Provisions Judge of the District Court of Amsterdam, 482043/KG RK 11–362, 10 May 2012, (2012) 37 Y.B. COMM ARB 279–280.

¹³ *Yukos Oil Co v. Dardana Ltd* [2002] EWCA Civ 543, [2002] CLC 1120, para 8, *per* Mance LJ.

¹⁴ *Dallah Real Estate and Tourism Holding Co v. Ministry of Religious Affairs of the Government of Pakistan* [2010] UKSC 46; [2011] 1 AC 763, para 67.

¹⁵ *Id.* para 68.

that there was no valid arbitration agreement”.¹⁶ However, his Lordship went on to agree with Lord Mance JSC in that the discretion was not arbitrary but there had to be some recognizable legal principle on which the discretion could be exercised. He also agreed with Lord Mance JSC that one such principle was when the party resisting enforcement was estopped from challenging the validity of the award.¹⁷ However, in Lord Collins’ opinion, the grounds on which the discretion could be exercised were broader and included, for example, a case in which English law would refuse to apply a foreign national law which makes the arbitration agreement invalid.¹⁸

Other jurisdictions have also recognized this discretion under the New York Convention. In Hong Kong, the position was explained in the judgment of the Court of Final Appeal in *Hebei Import & Export Corporation v. Polytek Engineering Company Limited*.¹⁹ In considering whether to refuse enforcement, the Court stated: “the use of the word ‘may’ in [Arbitration Ordinance] s 44 and Article V of the Convention enables the enforcing court to enforce an award, notwithstanding that a s 44 ground might otherwise be established. Whether a court would so act in such a case would depend in very large measure on the particular circumstances.”²⁰ In an earlier High Court case, Kaplan J noted that he could “envisage circumstances” where this discretion would be exercised, such as where the procedural irregularity asserted would have made no difference to the outcome of the dispute.²¹ In the United States, this discretionary standard was recognized in *Chromalloy v. Egypt*.²² In that case, an award had been set aside at the seat of arbitration. The District Judge considered that the discretionary standard of Article V should and could be read in tandem with Article VII of the Convention. As such, the court considered the issue of enforcement as a matter of U.S. federal law and concluded that there were no grounds, under U.S. federal law, to refuse the enforcement of the award. The Court further held that recognizing the decision of the Egyptian court would violate the U.S. public policy in favor of the enforcement of arbitral awards.²³

¹⁶ *Id.* para 126.

¹⁷ *Id.* para 127.

¹⁸ *Id.* para 128.

¹⁹ *Hebei Import & Export Corporation v. Polytek Engineering Company Limited* (1999) 24 Y.B. COMM ARB 652 (Court of Final Appeal of the Hong Kong Special Administrative Region).

²⁰ *Id.* para 52.

²¹ *Paklito Investment Ltd v. Klockner East Asia Ltd* (1993) 2 HKLR 39, paras 46–48.

²² *Matter of Chromalloy Aeroservices (Arab Republic)* 939 F Supp 907 (DDC 1996).

²³ That said, the bounds of the discretion have subsequently been narrowed in *TermoRio SA ESP (Colombia) v. Electranta SP (Colombia)* 487 F 3d 928 (2007). In that case, the court was similarly faced with the question of whether to enforce an award which had been set aside at the seat of arbitration. In contrast with *Chromalloy*, the court forcefully stated that “it takes much more than a mere assertion that the judgment of the primary State ‘[o]ffends the public policy’ of the secondary State to overcome a defence raised under Article V(1)(e)”. As such, the court declined to exercise its discretion. More recently see *Corporación Mexicana de Mantenimiento Integral, S De R L de CV v. Pemex-Exploración y Producción*, No 10 Civ 206 (AKH), 2013 WL 4517225, (SDNY Aug 27 2013). However, one thing is to recognize that there is a discretion, quite another is to define the boundaries of such a discretion. There is little doubt that the U.S. courts do accept that Art V of the New York Convention sets out a discretionary standard to be read together with Art VII of the Convention. For a discussion of the issues surrounding the enforcement of

In civil law jurisdictions, where the legal system is somewhat less accustomed to recognizing courts broad discretions to be exercised judicially, the same result may be achieved relying exclusively on Article VII of the Convention. In France, the courts have relied on Article VII of the Convention rather than on the discretionary standard in Article V to enforce awards notwithstanding one of the grounds for refusing enforcement under Article V was established.²⁴ In the *Putrabali* decision, for instance, an award which had been set aside at the seat in London was enforced in France. Although a ground under Article V of the New York Convention was proven, the Cour de Cassation stated that “pursuant to Article VII of the New York Convention [the claimant]’s request in France for recognition was admissible and it could rely on the French rules of international arbitration which do not include a foreign setting aside of the award among the cases of denial of recognition.”²⁵ German courts also rely on Article VII to provide for a restrictive interpretation of the grounds under Article V of the Convention and, therefore, enforce awards even if a ground for refusal would appear to have been established on a wider interpretation of ground in question. The German Federal Supreme Court held that “the New York Convention – either as an international convention or as the law referred to by Sect 1061 ZPO – does not prevent the German courts from applying the grounds for refusal of recognition restrictively. The New York Convention does not hinder recognition-friendly practice of the national law (Art VII(1) New York Convention). Courts remain free as before to interpret national law restrictively [*teleologische Reduktion*].”²⁶

The above analysis shows that there is already wide support for the proposition that Article V provides courts with discretion to enforce an award even where a ground for refusal has been made out. Alternatively, courts rely on more favorable domestic laws under Article VII to enforce awards notwithstanding a ground for refusal under Article V. And more favorable national provisions under Article VII are capable of informing the exercise of discretion under Article V: the discretionary standard in Article V allows for the enforcement of awards notwithstanding a ground for refusal is established and Article VII provides for a gateway through which the discretion can be exercised on some recognizable principle of domestic law.

The second argument in support of the mainstream view that allows a party to re-litigate or re-open, at the enforcement stage, issues that were, or could have been, litigated at the seat of the arbitration or in previous enforcement proceedings is policy-based: sovereign

annulled awards see Rishabh Jogani, *The Role of National Courts in the Post-arbitral Process: The Possible Issues with Enforcement of a Set-aside Award*, 81 ARBITRATION 254 (2015) (U.K.).

²⁴ This is possibly because of the less permissive, and more ambiguous, language in the French text of the New York Convention, which states that recognition and enforcement *will not be refused (ne seront refusées) unless* one of the listed grounds is shown.

²⁵ *Société PT Putrabali Adyamulia v. Société Rena Holding et Société Mnogutia Est Epices* [2007] *Revue de l'Arbitrage* 507, para 11.94 (Fr.).

²⁶ *H v. F in liquidation*, Oberlandesgericht Karlsruhe, 4 January 2012, 9 Sch 02/ 09 and Bundesgerichtshof, III ZB 8/12, 20 December 2012, (2013) 38 Y.B. COMM ARB 379, para 4.

States reserve to themselves a certain degree of control over foreign arbitral awards without which they are not prepared to recognize and enforce such awards within their territories.²⁷ Therefore, it is irrelevant that certain issues have been determined by a foreign court. They can be re-argued before the enforcement court not to protect the interests of the party opposing recognition and enforcement but to protect the interests of the enforcement State. This reasoning is correct in identifying the rationale for Article V. Article V is the maximum degree of control over foreign arbitral awards that Contracting States have reserved to themselves in the exercise of their sovereignty. However, precisely because of this function of Article V to protect the interests of the enforcement State, the enforcement State may choose to exercise a lower degree of scrutiny. The New York Convention allows it to do so both in Article V, which permits but does not require the court to refuse recognition and enforcement if a ground set out therein is established, and in Article VII, which allows Contracting States to apply national provisions that are more favorable to the recognition and enforcement of the award.

If Article V protects the interest of the enforcing State, it follows that States can apply a sliding scale approach in giving effect to foreign judgments precluding a party from raising a ground for opposing enforcement under Article V of the Convention depending on the degree of public interest involved.²⁸ This is clear if one considers that not all grounds under Article V have the same value as means of protecting the interests of the enforcing State. Thus, public policy under Article V(2)(b) is the strongest expression of a State's sovereignty and it is highly unlikely, if not logically impossible, that issues of public policy in State *A* can be adjudicated upon in State *B* with binding effect in State *A*. In *Yukos Capital Sarl v. OJSC Rosneft Oil Co*, the Court of Appeal held that a Dutch judgment refusing to recognize a Russian judgment setting aside an arbitral award as contrary to public policy did not give rise to an issue estoppel in England because English public policy was not the same as Dutch public policy.²⁹ On the other hand, issues of procedure under Article V(1)(b) and (d) appear to have as their predominant function the protection of individual interests, which may be safeguarded in any court of competent jurisdiction around the world. Therefore, there is much less of a problem for State *A* to give effect to a judgment in State *B* on whether the arbitral proceedings were conducted in breach of the unsuccessful party's procedural rights. A clear example of this approach may be found in the English judgment of *Minmetals Germany GmbH v. Ferco Steel Ltd*.³⁰ In that case, the courts of the seat of the arbitration had rejected a challenge of the award by the defendant on the ground of procedural irregularity. The defendant then sought to rely on the same ground in England to resist recognition and enforcement of the award. Colman J held that when the party resisting enforcement had applied for a remedy against

²⁷ See, e.g., *Hebei Import & Export Corporation v. Polytek Engineering Company Limited* (1999) 24 Y.B. COMM ARB 652 (Court of Final Appeal of the Hong Kong Special Administrative Region), paras 42–44 (especially the last sentence of para 43), *per* Sir Anthony Mason NPJ.

²⁸ *Dallah Real Estate and Tourism Holding Co v. Ministry of Religious Affairs of the Government of Pakistan* [2010] UKSC 46; [2011] 1 AC 763, para 68, *per* Lord Mance (Eng. and Wales).

²⁹ *Yukos Capital Sarl v. OJSC Rosneft Oil Co* [2012] EWCA Civ 855, [2012] 2 CLC 549 (Eng. and Wales).

³⁰ *Minmetals Germany GmbH v. Ferco Steel Ltd* [1999] CLC 647 (QB) (Eng. and Wales).

the award on the ground of a procedural defect before the court of supervisory jurisdiction and that remedy had been refused, “it will [...] normally be a very strong policy consideration before the English courts that it has been conclusively determined by the courts of the agreed supervisory jurisdiction that the award should stand”.³¹

This sliding scale approach has been adopted, albeit implicitly and tentatively, by the courts of Hong Kong. In *Paklito Ltd v. Klockner East Asia Ltd*, the argument was advanced that “if a court were satisfied that it would be contrary to the public policy of Hong Kong to enforce an award” or that the arbitration agreement was invalid under its applicable law, it would be inconceivable that the court’s discretion would be exercised notwithstanding but that the court’s discretion could be exercised if the ground pleaded was procedural irregularity.³² Kaplan J stated that, in relation to procedural challenges, he “could envisage circumstances where the court might exercise its discretion, having found the ground established, if the court were to conclude, having seen the new material which the defendant wished to put forward, that it would not affect the outcome of the dispute.”³³ This was expressly accepted in the later *Heibei* case, where Sir Anthony Mason NPJ said that a failure to raise a public policy ground in earlier proceedings cannot preclude a party from resisting on that ground the enforcement of the award in another jurisdiction because each jurisdiction has its own public policy³⁴ but then went on to say that this did “not exclude the possibility that a party may be precluded by his failure to raise a point before the court of supervisory jurisdiction from raising that point before the court of enforcement”.³⁵

In conclusion, the unqualified possibility for the unsuccessful party to oppose recognition and enforcement of an arbitral award on grounds that it raised, or could have raised, at the seat of the arbitration or in previous enforcement proceedings is not a requirement under the New York Convention. Courts around the world do rely on the discretionary standard in Article V and on the application of more favorable national provisions under Article VII to enforce awards notwithstanding a ground under Article V is or can be established. In doing so, they may apply a sliding scale approach that differentiates between the different grounds under Article V. In exercising their discretion under Article V or in applying more favorable national provisions under Article VII, courts may turn to recognizable domestic principles such as the doctrine of *res judicata*,³⁶ in its strand of issue estoppel, and the doctrine of abuse of process.

³¹ *Minmetals Germany GmbH v. Ferco Steel Ltd* [1999] CLC 647, 661 (QB) (Eng. and Wales); *Gujarat NRE Coke Limited v. Coeclerici Asia (Pte) Ltd* [2013] FCAFC 109, paras 64–66, where the Australian Federal Court of Appeal expressly endorsed these dicta.

³² *Paklito Investment Ltd v. Klockner East Asia Ltd* [1993] 2 HKLR 39, paras 46–48 (H.K.).

³³ *Id.* para 48.

³⁴ *Hebei Import & Export Corporation v. Polytek Engineering Company Limited* (1999) 24 Y.B. COMM ARB 652, para 46, *per* Sir Anthony Mason NPJ.

³⁵ *Id.* para 47.

³⁶ Peter Barnett, *The Prevention of Abusive Cross-border Re-litigation*, INTERNATIONAL AND COMPARATIVE LAW QUARTERLY 943, 943–945 (2002) (U.K.); NEIL ANDREWS, THE THREE PATHS OF JUSTICE: COURT PROCEEDINGS, ARBITRATION AND MEDIATION IN ENGLAND 115–118 (Springer, 2012); BERNARD HANOTIAU, COMPLEX ARBITRATIONS: MULTIPARTY, MULTICONTRACT, MULTI-ISSUE AND CLASS

C. Res Judicata and Issue Estoppel

The doctrine of *res judicata* refers to the final and binding effect of a judicial (or arbitral) decision on the parties, their privies and successors in title.³⁷ It has two strands: cause of action estoppel³⁸ and issue estoppel.³⁹

Cause of action estoppel prevents the parties, their privies or successors in title from pursuing the same cause of action or claim in subsequent proceedings (“cause of action estoppel”).⁴⁰ As a consequence, it is unlikely that this preclusion will ever be directly relevant in enforcement proceedings under the New York Convention. Generally, the cause of action in enforcement proceedings is a claim to the enforcement of the award, which is presumed to be valid, whereas the cause of action in setting aside proceedings is

ACTIONS 239–241 (Kluwer Law International 2006). For a comparative approach to the application of the doctrine in civil law and common law countries, see Filip de Ly & Audley Sheppard, *ILA Interim Report on Res Judicata and Arbitration*, 25(1) ARBITRATION INTERNATIONAL 35 (2009) (U.K.) and *ILA Final Report on Res Judicata and Arbitration*, 25(1) ARBITRATION INTERNATIONAL 67 (2009) (U.K.).

³⁷ SPENCER BOWER, TURNER & HANDLEY, *THE DOCTRINE OF RES JUDICATA* (4th ed., LexisNexis 2009); PETER BARNETT, *RES JUDICATA, ESTOPPEL, AND FOREIGN JUDGMENTS* 8–9 (Oxford University Press 2001); NEIL ANDREWS, *MODERN CIVIL PROCESS: JUDICIAL AND ALTERNATIVE FORMS OF DISPUTE RESOLUTION IN ENGLAND* 157–158 (Mohr Siebeck 2008). The principle has been recognized as an established element of international law by international courts and tribunals: *South West Africa Case* (1966) I.C.J. Rep. 4, 240; Also see *Case Concerning the Arbitral Award Made by the King of Spain on 23 December 1906 (Honduras v. Nicaragua)*, 1960 I.C.J. Rep. 192; *Maritime Delimitation and Territorial Questions Between Qatar and Bahrain*, 2001 I.C.J. Rep., para 303; *Waste Management Inc v. Mexico (Mexico’s Preliminary Objection)*, ICSID, decision dated 26 June 2003, (2002) 41 ILM 1315, para 39; *CME Czech Republic BV v. The Czech Republic*, Final Award, 14 March 2003, para 435; *Amco v. Indonesia (Resubmission: Jurisdiction)* ICSID 89 ILR 553, 560. See, generally, Filip de Ly and Audley Sheppard, *ILA Interim Report on Res Judicata and Arbitration*, 25 ARBITRATION INTERNATIONAL 35 (2009) (U.K.).

³⁸ PETER BARNETT, *RES JUDICATA, ESTOPPEL, AND FOREIGN JUDGMENTS* 92–97 (Oxford University Press 2001); SEAN WILKEN & KARIM GHALY, *THE LAW OF WAIVER, VARIATION AND ESTOPPEL* 319–321 (3d ed., Oxford University Press 2012).

³⁹ The position in most common law jurisdictions reflects that of England. In Australia for example, parties may plead both issue and cause of action estoppel in enforcement proceedings. There is also a parallel rule to that in *Henderson v. Henderson* (discussed below) which is instead commonly known as “Anshun Estoppel”: K.R. Handley, *Res Judicata: General Principles and Recent Developments*, 18 AUSTRALIAN BAR REVIEW 214 (1999). The doctrine is similarly extended to Canada: DONALD LANGE, *THE DOCTRINE OF RES JUDICATA IN CANADA* 376 (Ontario: LexisNexis 2004). The United States has taken a different conceptual approach to the issue, however the effects are similar. *Res judicata* may be invoked in the form of claim preclusion or issue preclusion. There is no doctrine of abuse of process akin to that in England. Claim preclusion, however, is interpreted broadly so as to encompass issues which should have been raised, as well as those which in fact did arise in the previous proceedings. In some respects this creates a similar effect to the rule in *Henderson v. Henderson*: Justine N Stefanelli, *The Effect in the European Community of Judgments in Civil and Commercial Matters: Recognition, Res Judicata and Abuse of Process*, REPORT ON USA 57. It has been said that the English common law doctrine of *res judicata* is “entirely consistent with [...] the rule of the Civil law”: *Nelson v. Couch* (1863) 15 CB (NS) 99, 108 (Willes J) (Eng. and Wales).

⁴⁰ *Virgin Atlantic Airways Ltd v. Zodiac Seats UK Ltd (formerly Contour Aerospace Ltd)* [2013] UKSC 46, [2013] 3 WLR 299, para 17 (Eng. and Wales).

the claim that the award is invalid because of the ground pleaded. Furthermore, the cause of action in enforcement proceedings in country A will not be the same as the cause of action in enforcement proceedings in country B as in country A the cause of action is the right to the enforcement of the award in country A whereas in country B the cause of action is the right to the enforcement of the award in country B.⁴¹

However, in England and Wales, and in many common law jurisdictions, the doctrine of *res judicata* encompasses the doctrine of issue estoppel. This doctrine was stated by Lord Sumption JSC in the following terms:⁴²

[...] even where the cause of action is not the same in the later action as it was in the earlier one, some issue which is necessarily common to both was decided on the earlier occasion and is binding on the parties.

The doctrine of issue estoppel applies in a cross-border context.⁴³ In *Carl Zeiss*,⁴⁴ the House of Lords ruled that a West German judgment establishing who was the successor of the pre-war Carl Zeiss Foundation was capable of giving rise to an issue estoppel under English law provided that three conditions were fulfilled: (a) the judgment must be a final decision on the merits by a court of competent jurisdiction; (b) the subject matter must be the same; (c) the parties must be the same. The third condition was not met on

⁴¹ This, of course, rather depends on the complex question of what exactly the cause of action is, a question that may have different answers in different jurisdictions. In the United States, for example, the concept of cause of action appears to be broad and, therefore, probably setting aside proceedings and enforcement proceedings in which the respondent resists enforcement may be said to have the same cause of action: *Belmont Partners LLC v. Mina Mar Group Inc* 741 F Supp 2d 743 (WDVa 2010). Ultimately, the conclusions of this article do not depend on the precise characterization of the preclusion as cause of action or issue estoppel.

⁴² *Virgin Atlantic Airways Ltd v. Zodiac Seats UK Ltd* (formerly *Contour Aerospace Ltd*) [2013] UKSC 46, [2013] 3 WLR 299 (Eng. and Wales).

⁴³ The question of which legal system will determine the preclusive effects of a foreign judgment has not been finally answered and divergent approaches can be found in different jurisdictions. Several theories have been put forward as to which law governs the effect of these judgments, which can be reduced essentially to four: (a) the judgment has only the effects that it has in the country of origin; (b) the judgment has only the effects it has in the country of recognition; (c) the judgment has all the effects it has in the country of origin and all the effects it has in the country of recognition; (d) the judgment has only the effects that it has in the country of origin that correspond to effects that it has in the country of recognition. The English courts have generally proceeded on the basis that a foreign judgment, once recognized, has the effects that an equivalent judgment would have under English law but bearing in mind that a foreign judgment cannot create a preclusion in England if it is not capable of doing so in the country of origin. See, further, S Harder, *The effects of recognized foreign judgments in civil and commercial matters*, 62 INTERNATIONAL & COMPARATIVE LAW QUARTERLY 441(2013) (U.K.). The analysis and conclusions in this article do not depend on the solution to this problem. The question discussed here is whether and, if so, in what circumstances and with what exceptions, a judgment in setting aside or enforcement proceedings or failure to apply for the setting aside of the award or to resist enforcement abroad may prevent a party from raising an issue that could have been raised in the earlier proceedings in subsequent enforcement proceedings in a different country. Once this question has been answered, there arises the subsequent, logically separate issue of the law governing the preclusive effect.

⁴⁴ *Carl Zeiss Stiftung Appellants v. Rayner & Keeler Ltd* [1967] 1 AC 853 (HL) 919 (Eng. and Wales).

the facts but *Carl Zeiss* unequivocally established that issue estoppel applies to foreign judgments.

The subsequent case of *The Sennar* dealt with a Dutch judgment which decided that a bill of lading contained an exclusive jurisdiction clause in favor of the courts of Khartoum. The House of Lords held that the decision of the Dutch court was a decision on the merits which estopped the claimants from arguing in England that the English courts had jurisdiction over the matter.⁴⁵ The significance of this case for international arbitration is that it clarified that the doctrine of issue estoppel may apply to jurisdictional clauses and, therefore, also to foreign judgments on the existence, validity and scope of arbitration agreements. More generally, a foreign judgment on the validity of an arbitration award is capable of giving rise to issue estoppel.

The doctrine of issue estoppel may prevent a party from re-opening an issue already determined in a final judgment on the merits of a court of competent jurisdiction between the same parties, their privies or successors in title. A final judgment by a court of supervisory jurisdiction at the seat of the arbitration clearly qualifies as a judgment giving rise to issue estoppel. Lord Collins JSC in *Dallah* commented, obiter, that a judgment by a court at the seat of the arbitration may, in certain circumstances, give rise to an estoppel or other preclusion.⁴⁶ Even more clearly, Moore-Bick LJ in the court below said that a decision of the supervisory court may finally determine questions concerning the fundamental validity and integrity of an arbitral award and thereby itself create an estoppel by record.⁴⁷ This was confirmed by the Court of Appeal in *Yukos v. Rosneft*, where Rix LJ, giving the judgment of the Court, proceeded on the assumption that a judgment in foreign enforcement proceedings was capable of giving rise to an issue estoppel in England and Wales.⁴⁸ If this is so in relation to foreign enforcement proceedings, it must a fortiori also apply to setting aside proceedings at the seat.

This approach is not limited to English law. In Australia, in *Blair v. Curran*,⁴⁹ the High Court held that “a judicial determination directly involving an issue of fact or law disposes once and for all of the issue, so that it cannot afterwards be raised between the same parties or their privies.” This also applies to decisions of arbitral tribunals and foreign judgments. In *Coeclerici Asia (Pte) Ltd v. Gujarat NRE Coke Limited*,⁵⁰ Foster J was of the firm view that a decision in the supervisory court creates an issue estoppel in subsequent enforcement proceedings as to whether the proceedings were conducted in breach of the principles of natural justice. In that case, Coeclerici had obtained an arbitral

⁴⁵ DSV Silo-und Verwaltungsgesellschaft mbH v. Owners of The Sennar (The Sennar) [1985] 1 WLR 490 (HL) (Eng. and Wales).

⁴⁶ Dallah Real Estate and Tourism Holding Co v. Ministry of Religious Affairs of the Government of Pakistan [2010] UKSC 46; [2011] 1 AC 763, para 98 (Eng. and Wales).

⁴⁷ Dallah Real Estate and Tourism Holding Co v. Ministry of Religious Affairs of the Government of Pakistan [2009] EWCA Civ 755, para 57 (Eng. and Wales).

⁴⁸ Yukos Capital Sarl v. OJSC Rosneft Oil Co (No 2) [2012] EWCA Civ 855, paras 147–149.

⁴⁹ Blair v. Curran (1939) 62 CLR 464, 531 (Austl.).

⁵⁰ Coeclerici Asia (Pte) Ltd v. Gujarat NRE Coke Limited [2013] FCA 882 (Austl.).

award in its favor from a tribunal with its seat in London. The respondent, Gujarat, had sought to challenge the award under section 68 of the English Arbitration Act 1996 for procedural irregularity on the basis that it was not given a reasonable opportunity to present his case. The challenge was rejected.⁵¹ Gujarat subsequently sought to resist enforcement in Australia under the International Arbitration Act, section 8(5)(c), dealing with the party's inability to present his case, and section 8(7)(b) and (7A)(b), dealing with breach of public policy and providing that a breach of natural justice is a breach of public policy. Foster J held that there was no material difference between section 68 of the English Arbitration Act 1996 and the Australian International Arbitration Act, despite the differing statutory frameworks. Furthermore, the facts relied upon were the same in both sets of proceedings. As such, he considered that the English judgment had decided the question of the alleged breach of natural justice and this gave rise to an issue estoppel. Foster J went on, stating that "even if there were no issue estoppel or *res judicata*, it would generally be inappropriate for this Court, being the enforcement court of a Convention country, to reach a different conclusion on the same question as that reached by the court of the seat of arbitration."⁵² The judgment was unsuccessfully appealed.⁵³ The Full Court declined to decide the question of issue estoppel but agreed that in this case the issue was the same as that before the English courts. It also endorsed the approach of Foster J in the court below and of Colman J in *Minmetals* in saying that it will generally be inappropriate for the enforcement court to diverge from the view of the supervisory court on the same question of alleged procedural defect.⁵⁴ Interestingly, under Australian law a breach of natural justice also fell under the category of breach of public policy. This did not, however, prevent Foster J from upholding an estoppel and the Full Court from stating that departure from the decision of the supervisory court would generally be inappropriate.

The Israeli courts have taken a similar view to Foster J in the case of *Israel No 1, Epis SA v. Roche Diagnostics GmbH*.⁵⁵ This case concerned an award made by a tribunal with its seat in Switzerland. The award debtor ("Medibar") had unsuccessfully challenged the award in the Swiss federal courts on the grounds of breach of public policy. Medibar's central argument was that a dispute between Medibar and the arbitrators in relation to their fees rendered the arbitrators unable to rule objectively and fairly. Therefore the award breached Swiss public policy. This argument was rejected and Medibar subsequently sought to resist enforcement in the Israeli courts on the same basis. Israeli law was similar to Swiss law in this area. The Jerusalem District Court stated that "it has been established more than once that a final judgment given in a foreign jurisdiction creates issue estoppel in relation to all the matters decided by the foreign court. The rule is that a foreign judgment may serve as the basis of issue estoppel if it would also lead to

⁵¹ *Gujarat NRE Coke Ltd v. Coeclerici Asia (Pte) Ltd* [2013] EWHC 1987 (Comm) (Eng. and Wales).

⁵² *Coeclerici Asia (Pte) Ltd v. Gujarat NRE Coke Limited* [2013] FCA 882, para 102 (Austl.).

⁵³ *Gujarat NRE Coke Limited v. Coeclerici Asia (Pte) Ltd* [2013] FCAFC 109 (Austl.).

⁵⁴ *Gujarat NRE Coke Limited v. Coeclerici Asia (Pte) Ltd* [2013] FCAFC 109, para 65 (Austl.).

⁵⁵ *Epis SA v. Roche Diagnostics GmbH*, Jerusalem District Court, 23 November 2004, (2006) 31 Y.B. COMM ARB 788.

such estoppel” in the place where it was handed down.⁵⁶ The Court further stated that “it would not be reasonable to determine that this court is better able to examine the proper conduct of a foreign arbitral proceeding which was discussed and determined according to Swiss ZCC rules and Swiss procedure, than the Swiss courts.”⁵⁷ As in *Coeclerici*, the issue was essentially one of natural justice even if it was pleaded as a breach of public policy.

In the Indian case of *International Investor KCSC v. Sanghi Polyesters Ltd*,⁵⁸ the award debtor resisted enforcement in India, having already unsuccessfully challenged the award in the courts of the seat in England and Wales under section 68 of the English Arbitration Act 1996, alleging that he had been denied a reasonable opportunity to present his case. In considering this issue, the Andhra Pradesh High Court held that, because the same submission had been rejected by the competent court which had the jurisdiction to set aside the award if it were convinced otherwise, “the respondent cannot raise the same issue again in the proceeding for the enforcement of the award on the principle of ‘res judicata’.”⁵⁹

Some courts do, however, struggle with the application of the doctrine of issue estoppel in enforcement proceedings. On one view, this should not be a cause of concern or surprise. The application of such a doctrine to preclude a party from resisting enforcement under Article V of the New York Convention is, after all, a matter of national law under Article VII of the Convention. States are entitled but not required to apply more favorable provisions than those in Article V to the enforcement of foreign arbitral awards. And, more often than not, the formal rejection of the doctrine of issue estoppel does not mean that courts may not rely on broader principles, such as the discretionary standard under Article V or the principles of good faith, to achieve the same result through pretty much the same reasoning. An interesting example is the *Hebei* case.⁶⁰ The unsuccessful party in the arbitration had challenged the award at the seat of the arbitration, in Beijing. The Beijing courts had rejected the challenge. The same party subsequently sought to resist enforcement in Hong Kong. Sir Anthony Mason NPJ⁶¹ expressed the view “that it would be inconsistent with the principles on which the Convention is based to hold that the refusal of supervisory jurisdiction to set aside an award debars an unsuccessful applicant from resisting enforcement of the award in the court of enforcement.”⁶² The reason was that, precisely because it provides that

⁵⁶ *Epis SA v. Roche Diagnostics GmbH*, Jerusalem District Court, 23 November 2004, (2006) 31 Y.B. COMM ARB 788.

⁵⁷ *Id.* 788.

⁵⁸ *International Investor KCSC v. Sanghi Polyesters Ltd*, High Court, Andhra Pradesh, Civil Revision Petition No 331 of 2002; Civil Revision Petition No 1441 of 2002, 9 September 2002, (2005) 30 Y.B. COMM ARB 577.

⁵⁹ *Id.* para 19.

⁶⁰ *Hebei Import & Export Corporation v. Polytek Engineering Company Limited* (1999) 24 Y.B. COMM ARB 652 (Court of Final Appeal of the Hong Kong Special Administrative Region).

⁶¹ Justices Litton PJ and Bokhari PJ gave concurring judgments essentially agreeing with the main gist of Sir Anthony Mason NPJ’s judgment.

⁶² *Id.* paras 43 and 44.

enforcement of a foreign award may be refused on the grounds specified in Article V, the Convention must have envisaged that, although an award may be valid at the seat, it may be tainted by such a serious defect in the eyes of the enforcement court that the award should not be enforced.⁶³ This is correct: the Convention allows a Contracting State to refuse enforcement of a foreign award which is valid at the seat if a ground under Article V is established. However, it does not compel a Contracting State to do so. The question is whether estoppel is an appropriate basis for enforcing an award notwithstanding a ground under Article V is or can be established. On this fundamental policy question, His Lordship's view appears to have been influenced by two factors: (a) firstly, the application of the doctrine of issue estoppel would have required a "precise comparison" between the law of the People's Republic of China and the law of Honk Kong to ascertain "whether the respective laws gave rise to identical or similar issue";⁶⁴ and, (b) secondly, the ground pleaded in the case was breach of public policy, even if the alleged breach consisted in the apparent bias of the chief arbitrator and in the inability of the award debtor to present his case.⁶⁵ Neither factor is, however, persuasive.

As regards the first factor, for the doctrine of issue estoppel to apply to a foreign judgment it is not necessary that the foreign legal regime must be exactly the same as the enforcement court's legal framework. In fact, this is not what Sir Anthony Mason NPJ said. Were it otherwise, issue estoppel would hardly ever arise from a foreign judgment. What His Lordship was saying is that a detailed comparison was required to ascertain whether identical or similar issues were raised in the two sets of proceedings. The level of detail required in each case depends, of course, on all the circumstances and is probably a matter of degree but the analysis is functional: the court must be satisfied that the issue is the same not that the legal frameworks are the same. In *Coeclerici Asia (Pte) Ltd v. Gujarat NRE Coke Limited*, the Australian Full Court of the Federal Court of Appeal had no problem in concluding, albeit obiter, that a serious irregularity issue under section 68 of the English Arbitration Act 1996 was the same as an issue as to the party's alleged inability to present his case under section 8(7)(b) and (7A)(b) of the Australian International Arbitration Act, notwithstanding the clear differences in the respective legal frameworks in England and Wales and in Australia.⁶⁶

As regards the second factor, it is undoubtedly true that each Contracting State is entitled to apply its own public policy, which may differ from the public policy of the State of the seat. In principle, therefore, there cannot be issue estoppel in relation to the public policy exception under Article V(II)(b) of the Convention because the issue arising in the two sets of proceedings is necessarily different. However, the matter may be different when the breach of public policy is dependent on the establishment of a procedural breach under Article V(1)(b) or (d) of the Convention. Whether such breaches, or a subset thereof, are a breach of public policy is a question that necessarily differs from jurisdiction to jurisdiction. But whether there has been a procedural breach in the first

⁶³ *Id.* para 43.

⁶⁴ *Id.* para 40.

⁶⁵ *Id.* para 46 (stating that "each jurisdiction has its own public policy").

⁶⁶ *Gujarat NRE Coke Limited v. Coeclerici Asia (Pte) Ltd* [2013] FCAFC 109, para 62 (Austl.).

place is not an issue of public policy and is capable, therefore, of being the same in proceedings at the seat and before the enforcement court. Again, in *Coeclerici Asia (Pte) Ltd v. Gujarat NRE Coke Limited*, the ground pleaded was both the party's alleged inability to present his case and a breach of public policy, based on the same facts. The Australian Full Court of the Federal Court of Appeal had no difficulty at all in coming to the view that the issue was the same before the English and the Australian courts.⁶⁷ Nor did the Jerusalem District Court in *Israel No 1, Epis SA v. Roche Diagnostics GmbH* have any difficulty on precisely the same point.⁶⁸ Sir Anthony Mason NPJ himself in *Hebei* recognized that when a procedural irregularity is pleaded as a breach of public policy, the respondent continues to bear the burden of proof notwithstanding the suggestion that, under Article V(II) of the Convention, the court can take the point on its own motion.⁶⁹ A procedural irregularity does not cease to be what it is because it also amounts to a breach of public policy in a particular jurisdiction.

In any event, the Hong Kong Court of Final Appeal allowed the appeal and ruled that the award should be enforced because, *inter alia*, the respondent had failed to raise one of the alleged procedural breaches in the arbitration, thus losing the right to rely on the breach later, based on broader principles of estoppel, good faith or the rule that non-compliance with the governing rules shall be raised promptly in the arbitration itself.⁷⁰ Sir Anthony Mason NPJ also considered, *obiter*, that failure to raise an issue before the court of the seat would prevent the award debtor from relying on a procedural breach in enforcement proceedings⁷¹ while Justice Litton PJ said that "it would be an unusual case where [the court of the seat] has ruled in favor of the validity of the award, yet the court in the enforcement jurisdiction nevertheless concludes that enforcement should be denied for public policy reasons".⁷² The *Hebei* case, therefore, does not contradict the possibility and desirability, in law and in policy, to apply the doctrine of issue estoppel in enforcement proceedings although it is probably authority for the proposition that, under Hong Kong law, a foreign judgment of the court at the seat of the arbitration does not give rise to an issue estoppel in enforcement proceedings in Hong Kong.

In conclusion, there appear to be sound policy reasons for holding that a judgment rejecting a challenge to the award at the seat is capable in principle of giving rise to issue estoppel in enforcement proceedings. Whether this is so is a matter for the law of the enforcing court.

D. Abuse of process

⁶⁷ *Id.*

⁶⁸ *Epis SA v. Roche Diagnostics GmbH*, Jerusalem District Court, 23 November 2004, (2006) 31 Y.B. COMM ARB 788.

⁶⁹ *Hebei Import & Export Corporation v. Polytek Engineering Company Limited* (1999) 24 Y.B. COMM ARB 652 (Court of Final Appeal of the Hong Kong Special Administrative Region), para 56.

⁷⁰ *Id.* paras 47–55.

⁷¹ *Id.* para 54.

⁷² *Id.* para 66.

The ability of the unsuccessful party to resist recognition and enforcement of a foreign arbitral award under Article V of the New York Convention may be constrained by the general and inherent power of the court to prevent its process being abused. As Lord Diplock said in *Hunter v. Chief Constable of the West Midlands Police*, this inherent power is one which any court of justice must possess “to prevent misuse of its procedure in a way which, although not inconsistent with the literal application of its procedural rules, would nevertheless be manifestly unfair to a party to litigation before it, or would otherwise bring the administration of justice into disrepute among right-thinking people”.⁷³

The abuse of process doctrine is most commonly applied in circumstances in which there has been previous litigation between the same parties and one of them seeks to bring a claim or raise a defense in later proceedings which could and should have been raised in the earlier proceedings. In English law, this rule originates in *Henderson v. Henderson*.⁷⁴ In that case, a court in Newfoundland had ordered A, who had been in partnership with B, to pay C, B’s next of kin, sums due to him as beneficiary of B’s estate. In England, A sought to recover from C money allegedly due to him as a creditor of B’s estate. In a celebrated statement, Wigram V-C said that a party is precluded from raising in subsequent proceedings not only the points on which the court was actually required to rule but every point “which properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time”.⁷⁵ The effect of this rule in enforcement proceedings is that, for instance, a judgment rejecting a challenge to the award at the seat for lack of jurisdiction also prevents the unsuccessful party from relying on a procedural breach under Article V(1)(b) or (d) of the New York Convention as a ground for resisting enforcement if this matter could have been raised in the setting aside proceedings. More generally, the party who lost a challenge to the arbitral award at the seat of the arbitration may be prevented from litigating under Article V of the New York Convention any issues that could have been raised in the proceedings at the seat.⁷⁶

The abuse of process doctrine may, however, be wider and apply in cases in which a party could have brought proceedings in a court of competent jurisdiction and did not do so, electing to bring proceedings elsewhere at a later stage instead. Such an extension

⁷³ *Hunter v. Chief Constable of the West Midlands Police* [1982] AC 529, 536 (Eng. and Wales).

⁷⁴ *Henderson v. Henderson* (1843) 3 Hare 100; 67 ER 313 (Eng. and Wales). The modern statement of the rule is found in *Johnson v. Gore Wood & Co (A Firm)* [2000] UKHL 65; [2002] 2 AC 1 (Eng. and Wales). See also PETER BARNETT, *RES JUDICATA, ESTOPPEL, AND FOREIGN JUDGMENTS* 188–191 (Oxford University Press 2001); Gary Watt, *The Danger and Deceit of the Rule in Henderson v. Henderson: A New Approach to Successive Civil Actions Arising from the Same Factual Matter*, 19 CIVIL JUSTICE QUARTERLY 287 (2000) (U.K.); Gary Watt, *Henderson is dead! Long live Henderson! – the Modern Rule of Abuse of Process*, 20 CIVIL JUSTICE QUARTERLY 90 (2001) (U.K.) and K.R. Handley, *A Closer Look at Henderson v. Henderson*, 118 LAW QUARTERLY REVIEW 397 (2002) (U.K.).

⁷⁵ *Henderson v. Henderson* (1843) 3 Hare 100, 114–115 (Eng. and Wales).

⁷⁶ See, e.g., *H v. F in liquidation*, Oberlandesgericht Karlsruhe, 4 January 2012, 9 Sch 02/09 and Bundesgerichtshof, III ZB 8/12, 20 December 2012, (2013) 38 Y.B. COMM ARB 379.

could be based on the words of Lord Bingham in *Johnson v. Gore Wood & Co (A Firm)*.⁷⁷

It is, however, wrong to hold that because a matter could have been raised in earlier proceedings it should have been, so as to render the raising of it in later proceedings necessarily abusive. That is to adopt too dogmatic an approach to what should in my opinion be a broad, merits-based judgment which takes account of the public and private interests involved and also takes account of all the facts of the case, focusing attention on the crucial question whether, in all the circumstances, a party is abusing or misusing the process of the court by seeking to raise before it the issue which could have been raised before.

Failing to raise an issue may occur in two contexts. A party may have brought proceedings in which the issue could have been raised and failed to raise it. But a party may fail to bring proceedings altogether. In principle, there is no reason to treat these two types of conduct differently although in practice courts may be much more careful in upholding a preclusion based simply on failure to bring proceedings rather than on failure to raise an issue in proceedings which have actually been brought. Failure to bring proceedings altogether may be motivated by innumerable factors, some of which may be entirely justified. Inaction is, by its nature, ambiguous. It could be difficult for a court to determine, ex post and on the basis of conflicting evidence, whether, on the face of mere inaction, the award debtor is abusing the process of the court by raising later an issue that could have been raised before. This is probably the reason why courts appear to adhere to the proposition that the mere failure to challenge the award at the seat of the arbitration does not, without more, deprive the unsuccessful party of the right to resist recognition and enforcement of the award under Article V of the New York Convention. But this proposition is not absolute.

Courts are particularly cautious when it comes to the jurisdiction of the arbitrators. In *Dallah*, for example, Lord Collins JSC, agreeing with Moore-Bick LJ in the court below, said that “the failure by the resisting party to take steps to challenge the jurisdiction of the tribunal in the courts of the seat would rarely, if ever, be a ground for exercising the discretion in enforcing an award made without jurisdiction”. Thus his Lordship not only confined his statement to a challenge relating to jurisdiction but, even limited to that particular ground, he did not exclude the exercise of the discretion altogether.⁷⁸ This approach was adopted in the South African case of *Phoenix Shipping Corporation v. DHL Global Forwarding SA (Pty) Ltd*.⁷⁹ The proceedings, with seat in London, involved three parties, Phoenix, DHL and Bateman. An award was made in which DHL was liable to pay Phoenix, and furthermore Bateman was ordered to indemnify DHL for a portion of

⁷⁷ *Johnson v. Gore Wood & Co (A Firm)* [2000] UKHL 65; [2002] 2 AC 1, 31 (Eng. and Wales).

⁷⁸ *Dallah Real Estate and Tourism Holding Co v. Ministry of Religious Affairs of the Government of Pakistan* [2010] UKSC 46; [2011] 1 AC 763, para 131 (Eng. and Wales).

⁷⁹ *Phoenix Shipping Corporation v. DHL Global Forwarding SA (Pty) Ltd* (High Court of South Africa, Western Cape Division) (2012) 37 Y.B. COMM ARB 290.

the award. Phoenix sought the enforcement of the award in South Africa. DHL sought leave to intervene as co-applicant in the proceedings in order to enforce the portion of the award in its favor against Bateman. Bateman resisted this relief on the basis that it was not a party to the arbitration agreement and therefore the tribunal had no jurisdiction.⁸⁰ Conversely, DHL argued that Bateman was estopped from raising the point of jurisdiction, since it did not challenge the award on this basis in the courts of the seat. The High Court of South Africa agreed with the judgment of the UK Supreme Court judgment in *Dallah Real Estate* that nothing in the New York Convention or in their respective domestic legislation contains “any suggestion that a party resisting recognition or enforcement of an award in any one country has an obligation to seek to set aside the award in the other country where the award was made.”⁸¹ On all the facts, including that Bateman had disputed the Tribunal’s jurisdiction throughout the proceedings, it was held that Bateman was not precluded from relying on this objection.

However, cases in which lack of jurisdiction is pleaded may be distinguished from cases concerning a procedural breach. When it comes to procedural irregularities, the English courts have considered the failure by the party opposing recognition and enforcement to invoke the jurisdiction of the supervisory court a relevant factor in deciding whether to enforce an award under Article V of the New York Convention. In *Minmetals*, Colman J had to determine whether an award which was allegedly in breach of natural justice was against English public policy. The judge set out the following considerations as relevant to his decision: (a) the nature of the procedural injustice; (b) whether the party resisting enforcement has invoked the supervisory jurisdiction of the courts at the seat of the arbitration; (c) whether a remedy was available under that jurisdiction; (d) whether the courts of that jurisdiction have conclusively determined the issue in favor of upholding the award; (e) if the party resisting enforcement has failed to invoke the remedial jurisdiction of the supervisory court, whether it was acting unreasonably in failing to do so.⁸² On the facts, the award was enforced on the ground that, inter alia, the defendant conducted itself unreasonably in the arbitration so as to deprive itself of its local remedies and to place itself “in exactly the same position in substance as if it had wholly ignored the availability of such remedies”.⁸³ While the judge was weighing the relevant considerations on an application to refuse the enforcement of a foreign award under Article V(2)(b) of the New York Convention, namely, on the ground that the award was against public policy, the case was essentially one of procedural irregularity.

Furthermore, cases in which a party fails to apply to the court altogether may be distinguished from cases in which a party initially issues proceedings to set aside the award and then discontinues them. In *Sheltam Rail Co (Pty) Ltd v. Mirambo Holdings Ltd*, the claimant issued proceedings under sections 67 and 68 of the English Arbitration Act 1996 to challenge a partial award. Before the claim was due to be heard, the claimant

⁸⁰ *Id.* paras 5–7.

⁸¹ *Id.* para 40.

⁸² *Minmetals Germany GmbH v. Ferco Steel Ltd* [1999] CLC 647, 661 (Eng. and Wales).

⁸³ *Id.* 662.

issued a notice of discontinuance of the claim. The defendant applied to the court to set aside the notice of discontinuance as it was confident that it would defeat the claimant's challenge of the partial award. Aikens J held that he had the power to set aside the notice if it was an abuse of process. The learned judge further noted that the claimant had decided to discontinue the claim rather than agreeing to its dismissal because it intended to preserve its ability to challenge the award if the defendants moved to enforce it in a New York Convention State. Therefore, the notice of discontinuance was allowed to stand only on the claimant's undertaking not to challenge recognition and enforcement by the defendants on the grounds raised before the English court.⁸⁴ The reason for this approach is that the judge considered that it would have been an abuse of process for the claimant to challenge the recognition and enforcement of the award under Article V of the New York Convention on the same grounds raised in the discontinued application to set aside the same award before the English court. While the claimant in this case did issue proceedings, the claim was never heard and there was no judgment. Still, a subsequent challenge in another state under Article V of the New York Convention could amount to an abuse of process in the eyes of the English court. The Singapore High Court judgment in *Galsworthy Ltd of the Republic of Liberia v. Glory of Wealth Shipping Pte Ltd*⁸⁵ may be properly understood as an application of the same approach. In this case, the unsuccessful party in an arbitration (GWS) brought proceedings to challenge the award at the seat, in London. As part of these proceedings, Galsworthy obtained an order for security for costs. GWS did not provide security and the proceedings were dismissed, *without* a decision on the merits. Galsworthy subsequently sought enforcement in Singapore. A preliminary dispute arose as to whether GWS was entitled to apply to set aside the enforcement order. The Singapore High Court accepted Galsworthy's argument that this would be an abuse of process. They noted, under the heading of "abuse of process", that "GWS had opportunity in choosing either the supervisory or enforcement court to mount its challenge [...] It elected their forum of challenge and they ought to be bound by it."⁸⁶ The Court went on to say that the principle of comity of nations requires courts to be slow to undermine an order made by other courts unless exceptional circumstances exist.⁸⁷

Internationally, a close relation of the doctrine of abuse of process is the principle of good faith. The litigation in *Astro Nusantara*, where the courts of Hong Kong and Singapore reached conflicting conclusions on whether a party who did not challenge an award on jurisdiction could later rely on lack of jurisdiction to resist enforcement of the same and

⁸⁴ *Sheltam Rail Co (Pty) Ltd v. Mirambo Holdings Ltd* [2008] EWHC 829 (Comm) [2009] Bus LR 302 (Eng. and Wales).

⁸⁵ *Galsworthy Ltd of the Republic of Liberia v. Glory of Wealth Shipping Pte Ltd* [2010] SGHC 304 (Singapore).

⁸⁶ *Id.* paras 5–6.

⁸⁷ *Id.* para 7. For a similar approach, see, e.g., *IPOC International Growth Fund Ltd v. LV Finance Group Ltd*, Civil Appeal No 30 of 2006 (British Virgin Islands Court of Appeal, 18 June 2007); *International Inv KCSC v. Sanghi Polyesters Ltd* (2005) 30 Y.B. COMM ARB 577 (Andhra Pradesh High Court 2002); *Denis Coakley Ltd v. Sté Michel Reverdy* (1984) 9 Y.B. COMM ARB 400 (Reims Cour d'appel).

subsequent awards on the merits, is an example in point.⁸⁸ The arbitration proceedings arose out of a shareholders' agreement relating to a joint venture for the provision of television services in Indonesia. Respondents had not challenged the award at the seat of arbitration in Singapore and the time limit for doing so expired. Nevertheless, they subsequently sought to resist enforcement in Singapore. The Singapore High Court initially dismissed their application, on the basis that, under the Singapore International Arbitration Act,⁸⁹ a setting aside application was an exclusive route to challenge a preliminary decision on jurisdiction.⁹⁰ This was overturned by the Court of Appeal, who held that a setting aside application on the ground of lack of jurisdiction was not intended to be a "one-shot remedy" and that, in failing to challenge the award, respondents had not waived their right, nor were they estopped or otherwise precluded, from resisting enforcement in Singapore.⁹¹

The same issue as to the jurisdiction of the tribunal was then raised before the courts of Hong Kong in enforcement proceedings.⁹² The Hong Kong High Court approached the question as one concerning the exercise of the discretion to enforce a foreign award as a matter of Hong Kong law.⁹³ In the Court's view, respondents decided "to defend the claim on the merits in the hope that [they] would succeed before the Tribunal, and keep the jurisdictional point in reserve to be deployed in the enforcement court only when it suited [their] interest to do so."⁹⁴ As a consequence, the Court held that respondents were not permitted to resist enforcement because they had "acted in breach of the good faith, or bona fide, principle."⁹⁵ This was an application, or probably an extension, of an obiter dictum by Sir Anthony Mason NPJ in *Hebei*, where His Lordship said that failure to raise a point concerning the apparent bias of an arbitrator before the supervisory court at the seat was an additional ground to reach the conclusion that the aggrieved party could no longer rely on the objection in enforcement proceedings in Hong Kong.⁹⁶ Though the whole judgment in *Astro Nusantara* can be read as an application of the principle of good faith under the New York Convention already recognized in *Hebei*, the same result,

⁸⁸ Hong Kong: *Astro Nusantara International BV v. PT First Media TBK*, HCCT 45/2010; Singapore: *PT First Media TBK v. Astro Nusantara International BV* [2013] SGCA 57.

⁸⁹ This is based on the UNCITRAL Model Law, Art 16(3).

⁹⁰ *Astro Nusantara International BV v. PT First Media* [2012] SGHC 212, paras 199–222.

⁹¹ *PT First Media TBK v. Astro Nusantara International BV* [2013] SGCA 57. This was, of course, a purely domestic law decision as the seat of the arbitration was in Singapore and the enforcement application was also in Singapore. However, the Singapore International Arbitration Act is based on the UNCITRAL Model Law on international commercial arbitration and the judgment of the Court of Appeal is, therefore, a clear example of the traditional approach, discussed in section B of this article, which considers that the unsuccessful party has an unfettered choice of remedies: it can either apply for the setting aside of the award or resist enforcement. Failure to avail itself of a setting aside application does not give rise to any preclusion.

⁹² *Astro Nusantara International BV v. PT First Media TBK*, HCCT 45/2010.

⁹³ *Id.* para 90–91.

⁹⁴ *Id.* para 91.

⁹⁵ *Id.* para 91.

⁹⁶ *Hebei Import & Export Corporation v. Polytek Engineering Company Limited* (1999) 24 Y.B. COMM ARB 652 (Court of Final Appeal of the Hong Kong Special Administrative Region), para 54.

through pretty much the same reasoning, could have been reached by an application of the abuse of process doctrine.

Doctrines such as abuse of rights or good faith or estoppel, all close relations to the doctrine of abuse of process, have been applied in civil law jurisdictions. In Spain, for example, it has been held that a failure to raise an objection as to the arbitrator's impartiality in available annulment proceedings in France meant that the Spanish court was precluded from reviewing this issue.⁹⁷ In Germany, prior to the reform to German Arbitration Law, which entered into force in 1998, the case law consistently held that a party was precluded from resisting enforcement under the Article V of the New York Convention where he had not raised the same objections at the court of the seat. This proposition was based on the interpretation of § 1044 of the *Zivilprozessordnung* (ZPO) in force at the time.⁹⁸ The 1998 arbitration reform replaced the previous domestic provision on enforcement by declaring the New York Convention applicable to the recognition and enforcement of all foreign awards.⁹⁹ The question is, therefore, whether the previous rule on preclusion that applied under § 1044 ZPO could still apply under the New York Convention. In 2010, the Federal Supreme Court refused to apply any rule of preclusion in the context of a plea for lack of jurisdiction.¹⁰⁰ The Court noted that nothing in domestic law or Article V "contains a reservation requiring that means of appeal must be pursued abroad against the arbitral award. Thus [...] this objection cannot be dismissed for failure to pursue means of appeal to be filed abroad within a given time limit."¹⁰¹ This did not, however, rule out the application of an abuse of process rule. The Court went on to state that "[w]e can agree with [the Claimant] that the principle of good faith is included in the international arbitration law triggered by s 1061(1) first sentence ZPO and includes a plea of abuse of process for contradictory behavior (*venire contra factum proprium*)".¹⁰² However, the Federal Supreme Court applied the rule of preclusion in, where the ground pleaded was procedural irregularity.¹⁰³ In this case H obtained an award against F in an arbitration with its seat in the United States. F did not commence proceedings to set aside the award and H sought to enforce the award in Germany. The

⁹⁷ Spain No 72, MK2 SA v. Wide Pictures, SL, Superior Court of Justice of Catalonia, 127/11, 17 November 2011.

⁹⁸ The issue is interesting: § 1044 was domestic law that, on its face, applied if there were no international conventions providing otherwise. However, § 1044 was in fact more favorable than the New York Convention in that it provided that an arbitral award that had become final in accordance with the law applicable to it was to be recognized in Germany. The case law had interpreted this provision as meaning that if the award had not been challenged in the State of origin, it could not be challenged in Germany either: Seller v. Buyer, Bundesgerichtshof [Supreme Court], Not Indicated, 26 April 1990.

⁹⁹ See now ZPO, § 1061(1), which provides that recognition and enforcement of foreign arbitral awards shall be granted in accordance with the New York Convention. Thus Germany withdrew the reservation of reciprocity initially made and extended the application of the Convention to all foreign awards. This meant, somewhat bizarrely, that the more favorable national law until then set out in § 1044 was repealed.

¹⁰⁰ French Seller v. German Buyer, Oberlandesgericht Munich, 23 November 2009 and French Seller v. German Buyer, Bundesgerichtshof, 16 December 2010, (2011) 36 Y.B. COMM ARB 273.

¹⁰¹ *Id.* para 25.

¹⁰² *Id.* paras 34–35.

¹⁰³ H v. F in liquidation, Oberlandesgericht Karlsruhe, 4 January 2012, 9 Sch 02/09 and Bundesgerichtshof, III ZB 8/12, 20 December 2012, (2013) 38 Y.B. COMM ARB 379.

Court cited the case law supporting the proposition that the debtor is precluded from invoking grounds for refusal of recognition “because it failed to rely on them timeously in an annulment action” in the courts of the seat.¹⁰⁴ The Court distinguished this case from the 2010 decision discussed above, on several points. Firstly, the party in this case had not previously raised the objection in the arbitration proceedings. Secondly, the party in this case is citing procedural defects whereas in the previous decision, they were disputing the validity of the arbitration agreement. Furthermore, the claimant in this instance had no reason to expect the defendant to resist enforcement, on the basis of the defendant’s prior behavior.¹⁰⁵ It appears that, in all the circumstances, this was sufficient to preclude the party from raising these objections at the enforcement stage.

E. Issue estoppel and abuse of process arising from previous enforcement proceedings

The role of the court at the seat of the arbitration is different from that of a court in enforcement proceedings. The court at the seat has supervisory jurisdiction in that it can entertain an application to set aside the award. If the award is set aside, the parties are no longer bound by it. The arbitrators cease to be *functi officio* and, depending on the ground on which the award was set aside, fresh proceedings may start to determine the same dispute that was not validly determined in the previous arbitration. The setting aside of the award provides the successful applicant with a ground to oppose enforcement under Article V(1)(e) of the New York Convention. An enforcement court has a more limited role: it determines whether the award should be enforced in its jurisdiction. If the respondent establishes a ground for refusal under Article V of the Convention, the enforcement court may refuse to enforce the award but the award continues to be legally binding on the parties. The arbitrators continue to be *functi officio* and, generally speaking, new arbitral proceedings cannot start afresh.¹⁰⁶ Article V of the New York Convention is silent on the effect of a decision not to enforce the award in further enforcement proceedings and the natural inference must, therefore, be that such a decision, unlike a judgment setting aside the award, is no ground for refusing enforcement in other jurisdictions. However, as a matter of domestic law, in principle, issue estoppel may arise from a judgment of an enforcement court. The question is whether this is permissible under the New York Convention and, if so, in what circumstances.¹⁰⁷

¹⁰⁴ *Id.* para 3.

¹⁰⁵ *Id.* paras 11–14.

¹⁰⁶ Except, possibly, in the very State where enforcement was denied.

¹⁰⁷ Some argue that a judgment in enforcement proceedings should never have a preclusive effect because: (a) to do so would let the procedural timetable determine the issue; (b) it would not be right to let a foreign court decide the issue of enforcement of a foreign award within the jurisdiction: Maxi Scherer, *Effects of International Judgments Relating to Awards*, 43 PEPPERDINE LAW REVIEW 637, 643–646 (2016). These arguments are, of course, arguments against estoppel arising from foreign judgments in general: any estoppel is based on a rule of priority (the earlier judgment prevails) and any estoppel precludes a court from deciding an issue that would otherwise be for the court to decide. This article argues that estoppel is,

It appears that a distinction should be drawn between previous judgments that enforce the award and previous judgments that refuse to enforce the award or, perhaps, more correctly, cases in which the estoppel operates in favor of enforcement (generally the previous judgment will therefore be a judgment enforcing the award) and cases in which the estoppel operates against granting enforcement (generally the previous judgment will therefore be a judgment refusing to enforce the award). The former category of case ought to be uncontroversial. The New York Convention allows the enforcing court to enforce the award even if a ground for refusal is established, including by applying more favorable national law provisions. There is no reason why national courts could not apply the principle of estoppel to preclude the party resisting enforcement to rely on a ground that has already been rejected by a foreign court in enforcement proceedings. More problematic are those cases where estoppel operates to establish a ground for refusing enforcement. This raises particular difficulties because, even if it is clear that there is discretion under the New York Convention to enforce an award notwithstanding a ground for refusal, the opposite is not true. There is no power to refuse enforcement if no ground under Article V has been established. And under Article VII national provisions can only apply if they are more favorable to the enforcement of the award, not if they lead to a refusal of enforcement.

The English Commercial Court directly considered this issue in *Diag Human SE v. Czech Republic*.¹⁰⁸ An arbitral tribunal, with its seat in the Czech Republic, made an award in favor of Diag Human SE (“Diag”). Diag first sought to enforce the award in Austria. The Czech Republic resisted enforcement on the basis that the award was not final and binding, as it was subject to an arbitral appeal process. The Austrian Supreme Court accepted this argument and refused enforcement of the award. Subsequent enforcement proceedings were brought in England. The question was whether the decision of the Austrian Supreme Court gave rise to an issue estoppel, precluding Diag from enforcing the award in England. In his judgment, Eder J held that where a foreign court decided that an award was not binding, there was no reason in principle why that decision should not give rise to an issue estoppel between the parties provided that the other conditions for an issue estoppel applied. In particular, provided that the issue was the same and that the decision could properly be said to be “on the merits”, it did not matter that the decision was made in enforcement proceedings as opposed to any other type of proceedings.¹⁰⁹

The notion that a previous enforcement judgment may give rise to issue estoppel was accepted obiter in the earlier English case of *Chantiers De L’Atlantique SA v. Gaztransport & Technigaz SAS*.¹¹⁰ The proceedings were conducted pursuant to the ICC rules, in Paris, in French and with French arbitrators and counsel. The arbitration

in principle and as a matter of policy, desirable. The question is in what circumstances it should apply and under what conditions.

¹⁰⁸ *Diag Human SE v. Czech Republic* [2014] EWHC 1639 (Comm) (Eng. and Wales).

¹⁰⁹ *Id.* para 59.

¹¹⁰ *Chantiers De L’Atlantique S.A v. Gaztransport & Technigaz SAS* [2014] EWHC 1639 (Comm) (Eng. and Wales).

agreement, however, provided that the seat of the arbitration was London and therefore annulment proceedings had to be brought in England. The arbitral tribunal had dismissed all claims and the successful respondent sought to have the award recognized and enforced in France. The unsuccessful party resisted enforcement, arguing that the award had been obtained by fraud. This argument was dismissed in France and the award was held to be enforceable. In the annulment proceedings in England, Flaux J first considered and dismissed the arguments of fraud on their merits. Obiter His Lordship noted that regardless of his conclusion, the decision in the French enforcement proceedings on what was materially the same issue would give rise to an issue estoppel which prevented the unsuccessful party from raising the allegations of fraud in subsequent proceedings.¹¹¹ Flaux J's obiter in *Chantiers De L'Atlantique* is correct on the facts because the French judgment rejected an argument that the award was obtained by fraud. Estoppel, therefore, worked in favor not against enforcement and this is allowed both under the discretionary Article V standard and by way of application of more favorable national provisions under Article VII. In *Yukos v Rosneft*, Rix LJ, giving the judgment of the Court, appeared to accept, implicitly, that issue estoppel could apply to a foreign judgment in enforcement proceedings.¹¹² He was also correct because issue estoppel in that case would have deprived the award debtor of the possibility of relying on the setting aside of the award as a ground for opposing enforcement. In *Diag Human*, however, estoppel worked against enforcement. The application of English domestic law was, therefore, not permitted under the Convention as it led the court to refuse enforcement even if no ground under Article V has been established.

Against the unidirectional application of the doctrine of issue estoppel advocated here, an argument could be made that the doctrine of issue estoppel does not introduce any additional ground for refusal into the New York Convention: estoppel operates to preclude a party to deny the existence of certain facts or legal consequences. The ground for refusal is and remains that the award has not yet become binding. Estoppel operates to determine whether, as a matter of law, that fact exists or not. However, there must be a serious doubt as to whether this interpretation is compatible with the pro-enforcement bias of the New York Convention and the generally accepted principle that the grounds for refusal under Article V must be interpreted narrowly. Furthermore, this interpretation is also inconsistent with the text of Article V, which explicitly sets out the only instance in which a decision of a foreign "competent authority" operates as a ground for refusing enforcement: this is the decision by a competent authority in the country in which, or under the law of which, the award was made to set aside the award. If the New York Convention had intended to allow other judgments in other proceedings to operate as a bar to enforcement it would, therefore, have stated this clearly. The fact that only the decision of the court of the seat setting aside the award is set out as a ground for refusal is a clear indication, or perhaps conclusive proof, that other judgments by other courts in other types of proceedings cannot have the same effect. Against this conclusion, some

¹¹¹ *Id.* paras 313–315.

¹¹² *Yukos Capital Sarl v. OJSC Rosneft Oil Co (No 2)* [2012] EWCA Civ 855, paras 147–149 (Eng. and Wales).

argue that estoppel is an element of public policy, and is thus allowed for under Article V(2)(b) of the Convention.¹¹³ Obviously, whether estoppel is an element of public policy depends on the law of each jurisdiction. Generally speaking, however, the principle that an issue decided by a foreign court is binding before the domestic courts does not belong to those fundamental notions of justice and morality that constitute public policy.¹¹⁴ It is a useful rule to achieve consistency and efficiency in dispute resolution in an ever more intertwined and global world. Such a rule, however, is clearly one of those provisions that may or may not be applied without engaging the most fundamental interests of the State.

It is important to note that the argument based on Articles V and VII of the Convention were not made before Eder J. The only legal arguments advanced to defeat issue estoppel were that estoppel could not arise from a judgment in enforcement proceedings and that there was no estoppel in the circumstances of the case. The latter argument was rightly rejected on the facts. The former argument was rightly rejected as a matter of law. There is nothing in English law or in the New York Convention (although the Convention was not discussed in *Diag Human*) that provides that a judgment by an enforcing court cannot give rise to issue estoppel if this works *in favor* of enforcement. So it appears that Eder J's judgment was given without the benefit of full arguments on the proper construction of section 103 of the Arbitration Act 1996 in light of the principles of the New York Convention. As such, His Lordship reached the right conclusion on the arguments and facts before him but not one that can be of general application. Perhaps wisely in a later case Walker J declined to comment obiter on such complex and yet important issue.¹¹⁵

Guidance on this issue in other jurisdictions is sparse. In the United States, the Draft U.S. Restatement on International Arbitration says that, in post award proceedings, U.S. courts must determine whether they “may re-examine a matter decided at an earlier stage of the proceedings [. . .] by a foreign court” by applying regular principles applicable to foreign judgments, including those of issue and claim preclusion.¹¹⁶ In *Belmont Partners LLC v. Mina Mar Group Inc.*,¹¹⁷ after the award was made in proceedings seated in the United States, two separate proceedings commenced – one in Ontario, for the enforcement of the

¹¹³ K S Harisankar, *Annulment versus Enforcement of International Arbitral Awards: Does the New York Convention Permit Issue Estoppel?*, 18 INTERNATIONAL ARBITRATION LAW REVIEW 47, 52 (2015) (U.K.).

¹¹⁴ It is trite that the public policy must be given a narrow interpretation: see, in the United States *Parsons & Whittemore Overseas Co v. Société Générale de l'Industrie du Papier* 508 F2d 969 (2d Cir 1974); *Karaha Bodas Co LLC v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara* 364 F 3d 274 (5th Cir 2004); in England and Wales *Deutsche Schachtbau v. Shell International Petroleum Co Ltd* [1990] 1 AC 295 (CA); *Westacre Investments Inc v. Jugoimport SPDR Holding Co Ltd* [1999] 3 WLR 811 (CA).

¹¹⁵ It bears quoting Walker J's statement in full: “In my view the issues which would or might fall for consideration on those matters are not necessarily straightforward, and are best left to be dealt with in a context where they would be determinative of the outcome.” *Malicorp Limited v. Government of the Arab Republic of Egypt, Egyptian Holding Company for Aviation, Egyptian Airports Company* [2015] EWHC 361 (Comm), para 43 (Eng. and Wales).

¹¹⁶ The American Law Institute, *Restatement of the Law (Third), The U.S. Law of International Commercial Arbitration*, Tentative Draft no 2 (April 2012) ss 4–8; Maxi Schreier, *Effects of Foreign Judgments Relating to International Arbitral Awards: Is the 'Judgment Route' the Wrong Road?*, 4 JOURNAL OF INTERNATIONAL DISPUTE SETTLEMENT 587, 593 (2013) (U.K.).

¹¹⁷ *Belmont Partners LLC v. Mina Mar Group Inc* 741 FSupp2d 743 (WDVa 2010).

award under the New York Convention, in which Mina Mar applied for a variation of the award, and one in the District Court for the Western District of Virginia, for confirmation of the award on the application of Belmont in which Mina Mar applied for the setting aside of the award.¹¹⁸ The Ontario Superior Court denied Mina Mar's application to vary the award and confirmed the award. The question was raised before the U.S. Court of Virginia whether the judgment of the Ontario court precluded Mina Mar's claim for relief in the United States. In the view of the Court, "the Ontario Superior Court's judgment can have preclusive effect if it meets the three prongs of the res judicata test." Applying the rules of res judicata and comity, the District Court determined that "claim preclusion bars this Court from deciding whether to modify or vacate the Award".¹¹⁹

Finally, failure to oppose enforcement in State *A* by mere inaction should not, generally, preclude the award debtor to oppose enforcement in State *B* on grounds that he could have raised in State *A*. Failure to oppose enforcement may be motivated by several justifiable considerations, including the decision not to submit to the jurisdiction of the enforcing court or the absence of assets within the jurisdiction. A general rule that the award debtor would have to resist enforcement wherever it is sought could also lead to abuses if the award creditor chooses a friendly jurisdiction for the sole purpose of creating a preclusion.

F. A Gloss on Corrective Mechanisms

Finally, a brief gloss on the principle, which is sometimes stated, that the doctrines of issue estoppel and abuse of process can be applied flexibly so as to achieve justice rather than injustice. This principle does not mean that these doctrines are simply the exercise of unstructured discretions. It means that, in certain circumstances, notwithstanding the conditions for the application of these doctrines appear to be met, the courts may decide to allow a party to re-litigate the issue that would otherwise be precluded. A comprehensive analysis of the corrective mechanisms that the courts could deploy to achieve avoid injustice would render this article unbearably long. The following considerations are illustrative of the flexibility built into the system.

Firstly, for a judgment to have a preclusive effect in a jurisdiction, it must be recognized in that jurisdiction.¹²⁰ There are grounds on which a court will not recognize a foreign

¹¹⁸ *Id.* paras 1–5.

¹¹⁹ *Id.* paras 15–19.

¹²⁰ Recognition and enforcement of foreign judgments in setting aside and enforcement proceedings is not governed by the European regime under Regulation 1215/2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast) [2012] OJ L351/1 ("Brussels I Regulation (Recast)"): Brussels I Regulation (Recast), recital 12, para 4, and Art 1(2)(d). Therefore, either the statutory regime in force for certain Commonwealth countries (Administration of Justice Act 1920 and Foreign Judgments (Reciprocal Enforcement) Act 1933) or the common law applies (the conditions for the recognition and enforcement of a foreign judgment at common law are set out, with admirable brevity and clarity, by Arden LJ in *Joint Stock Company (Aeroflot-Russian Airlines) v. Berezovsky* [2014] EWCA Civ 20, para 2 (Eng. and Wales)).

judgment. In England and Wales, a foreign judgment in setting aside or enforcement proceedings will not be recognized at common law if it was obtained by fraud, if it is in breach of English public policy, or if it is in breach of natural justice.¹²¹ This is already a significant safeguard against an abuse of the issue estoppel or abuse of process in enforcement proceedings.

Secondly, even when a judgment has been recognized, issue estoppel may not apply. Lord Wilberforce in *Carl Zeiss* referred to the need for caution when recognizing the issue estoppel effect of foreign judgments.¹²² In a similar vein, Lord Upjohn said that estoppels must be applied so as to work justice and not injustice.¹²³ In *Arnold v. National Westminster Bank*, the House of Lords recognized that the doctrine of issue estoppel is not absolute. There may be special circumstances in which the estoppel does not operate. In *Arnold*, a special circumstance was held to arise where further material became available which was relevant to the correct determination of a point involved in earlier proceedings, whether or not the point had been expressly raised and decided, but could not, by reasonable diligence, have been brought forward in those proceedings. Such further material was not confined to matters of fact but extended to issues of law. In that case, the judge in the earlier proceedings had made a mistake and a higher court had since overruled him. Therefore, the party who suffered from the mistake was not prevented from re-opening that issue when it arose in later proceedings.¹²⁴ There is no difficulty to apply this principle in cases where, for example, further material comes to light after the conclusion of the previous setting aside or enforcement proceedings or the time limits for the bringing of such proceedings which the relevant party could not, by reasonable diligence, have discovered before.¹²⁵ There is, however, no closed catalog of "special circumstances". Rix LJ would have applied the exception in *Yukos v. Rosneft* to allow the English courts to look afresh at the issue as to whether the Russian courts were partial and dependent on the basis that comity required that such an important question should be decided by the English courts afresh and should not be determined by an issue estoppel arising from a Dutch judgment.¹²⁶

Finally, the abuse of process doctrine is by its very nature a broad and flexible merits-based test. This is perfectly compatible with the discretion under Article V of the New

¹²¹ *JSC VTB Bank v. Skurikhin and others* [2014] EWHC 271 (Comm), para 20, *per* Simon J (Eng. and Wales). The fourth exception, which applies if the judgment is for a fine or other penalty, would generally not be relevant to judgments in setting aside or enforcement proceedings.

¹²² *Carl Zeiss Stiftung Appellants v. Rayner & Keeler Ltd* [1967] 1 AC 853 (HL) 919, 967 (Eng. and Wales).

¹²³ *Id.* 947.

¹²⁴ *Arnold v. National Westminster Bank Plc* [1991] 2 AC 93 (HL) (Eng. and Wales).

¹²⁵ This exception is specifically allowed in *Arnold*, which is not limited to subsequent changes in the law but applies to all "further material relevant to the correct determination of a point involved in the earlier proceedings, whether or not that point was specifically raised and decided, being material which could not by reasonable diligence have been adduced in those proceedings": *id.* 109, *per* Lord Keith of Kinkel, with whom Lord Griffiths, Lord Oliver of Aylmerton, Lord Jauncey of Tullichettle agreed (Lord Lowry giving a short concurring speech).

¹²⁶ *Yukos Capital Sarl v. OJSC Rosneft Oil Co (No 2)* [2012] EWCA Civ 855, paras 157–160.

York Convention and civil law doctrines such as abuse of rights or good faith. All the defenses to the recognition and enforcement of a foreign judgment as well as the special circumstances that would constitute an exception to the issue estoppel are certainly capable of being considered when a court applies the abuse of process doctrine. Indeed, the merits-based test goes further and allows the court to take into consideration of the circumstances of the case to determine whether to raise an issue that could have been raised in earlier proceedings would be an abuse of the process of the court.¹²⁷

G. Conclusions

This article explored the relationship between setting aside proceedings and enforcement proceedings and the relationship between two or more sets of enforcement proceedings to examine whether the award debtor may be precluded from raising in later proceedings grounds of attack on the award that it could have raised earlier. The main conclusions are the following:

1. The New York Convention does not require that recognition and enforcement of a foreign arbitral award be refused if one of the grounds in Article V is established. Contracting States are free to recognize and enforce arbitral awards even in the presence of one of the grounds in Article V. They may also apply more favorable national law provisions under Article VII of the Convention. Contracting States may, in particular, apply the doctrines of issue estoppel and abuse of process to prevent the award debtor from relying on a ground for opposing enforcement that could have been raised in earlier proceedings. Whether this preclusion applies depends on the nature of the earlier proceedings and the nature of the ground relied upon.
2. When a court at the seat of the arbitration has dismissed a challenge against the award, under the doctrine of issue estoppel the unsuccessful party should generally be prevented from re-litigating issues that have been determined by the court at the seat. All grounds for refusal except public policy may in principle be precluded.
3. When a court at the seat of the arbitration has dismissed a challenge against the award, the rule in *Henderson v Henderson* may prevent the unsuccessful party from resisting enforcement on grounds that could have been raised, but were not raised, in proceedings at the seat of the arbitration. All grounds for refusal except public policy may in principle be precluded.
4. As a general rule, a party is not required to challenge the award at the seat and failure to do so, without more, does not automatically prevent a party from resisting enforcement on any of the grounds in Article V of the New York Convention. However, this proposition is not absolute. It should apply, as a general rule, if the objection is one of jurisdiction. Assuming that the objection may be well founded, it seems reasonable to

¹²⁷ Johnson v. Gore Wood & Co (A Firm) [2000] UKHL 65; [2002] 2 AC 1, 31 (Eng. and Wales).

allow the relevant party to choose whether to seek a remedy against the award at the seat or to oppose enforcement elsewhere. However, if the objection relates to a procedural irregularity, in exercising their discretion under Article V, courts can take into consideration whether the party resisting enforcement should have availed itself of the remedies available at the seat of the arbitration and whether failure to have done so was unreasonable in the circumstances of the case applying a broad merits-based test as required by the doctrine of abuse of process or similar doctrines of good faith or abuse of rights. In the exercise of discretion, it would be material whether the party opposing enforcement failed to raise any challenge altogether or discontinued a challenge that it initially brought. In the latter case, the exercise of discretion will lean more heavily towards enforcing the award. Once again, no preclusion should apply to public policy objections.

5. Where a court of competent jurisdiction has made a judgment in previous enforcement proceedings, the doctrine of issue estoppel may apply to prevent the relevant party from relying on a ground for opposing enforcement but not to establish one such ground. The estoppel is unidirectional. Once again, no estoppel should arise in relation to public policy issues.

6. Failure to oppose enforcement of the award should not, without more, give rise to any preclusion or be relevant to the exercise of the discretion to enforce an award under Article V of the New York Convention.

7. An issue of public policy under Article V(II)(b) of the New York Convention will generally be determined by the court of the enforcement State because public policy may be different in each State. Therefore, an issue of public policy in State *A* is not the same as an issue of public policy in State *B*. However, there may be discrete issues relevant to the determination of the public policy question that may be the same in two jurisdictions. For example, when a procedural irregularity in the conduct of the proceedings is also considered a breach of public policy in the enforcement State, the question as to whether the procedural irregularity occurred may well be the same issue that was decided or could have been decided by a foreign court. On the other hand, whether and to what extent the procedural breach, if established, is a breach of public policy that may lead to the award being refused enforcement is an issue for the enforcement court on which a foreign judgment cannot give rise to an issue estoppel.

8. There are corrective mechanisms that allow courts to depart from a strict application of the doctrines of issue estoppel and abuse of process when to do so would clearly lead to injustice rather than serve the ends of consistency and finality in dispute resolution.

The possibility that a party may be estopped from opposing recognition and enforcement of an arbitral award under Article V of the New York Convention on grounds that it raised, or could have raised, before the court of the seat or in previous enforcement proceedings goes some way towards achieving more consistency in international commercial arbitration and limiting inefficient and unfair forum shopping. Ultimately,

increased consistency would also require increased convergence in the application of national rules on res judicata, issue estoppel and abuse of process or similar doctrines, including, in particular, good faith and estoppel (*nemo audit venire contra factum proprium*), to buttress the finality and effectiveness of international arbitral awards.